ORGANIZATIONS

Comment Letters

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People and Nature: Our Future Is in the Balance

Western Natural Resource Center

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Dear Mr. Spangle, Mr. Gould, and Ms. Simonek:

The following are comments submitted by the National Wildlife Federation (NWF) regarding the Draft Environmental Impact Statement/Environmental Impact Report (EIS/EIR), Biological Assessment (BA), and Habitat Conservation Plan (HCP) for the Lower Colorado River Multi-Species Conservation Program (LCR MSCP), Arizona, Nevada, and California.

The National Wildlife Federation is the nation's largest, not-for-profit, conservation and education organization with more than four million members and supporters. NWF promotes the conservation of natural resources and protection of the earth's environment by working cooperatively with individuals, organizations and 47 state affiliates on local, regional, and national environmental issues.

NWF appreciates the opportunity to comment on the plans for such a biologically important area. We support the concept of Alternative 1: Implementation of the Proposed Conservation Plan and Issuance of Section 10(a)(1)(B) Permit (Proposed Conservation Plan), however, we have concerns that the program will not successfully "...work toward the recovery of threatened and endangered species, as well as reduce the likelihood of additional species being listed" for the following reasons: reliance on restocking of endangered fish while ignoring the threats to their survival caused by the introduction of non-native species and a severely altered riverine NWF-1

ecosystem; failure to analyze and mitigate effects to burrowing owls; and the failure to address shortage conditions that may very likely have the effect of decreasing the availability of water necessary to maintain the constructed habitats under this program, as well as yet further decreasing groundwater levels and thus jeopardizing the survival of riparian species covered by this program. The following detailed comments seek to improve specific areas of EIS, BA and HCP and we hope they will be incorporated into the final plans. NWF-1 con't

Take Authorizations

National Wildlife Federation does not necessarily agree with positions taken by Reclamation that section 9 liability does not attach to nondiscretionary actions (the second full paragraph on BA page 2-2). The same applies to this statement on BA page 3-2 and HCP page 2-2: "Because Reclamation's role in water delivery is nondiscretionary and not subject to section 7 consultation, it is Reclamation's position that these activities do not create section 9 responsibility for Reclamation." This is not supported by the ESA. "[T]he taking of a protected species by any person (including a federal agency) violates section 9 of the ESA" unless authorized via a section 7 consultation or section 10 incidental take permit. *Sierra Club v. Babbitt*, 65 F.3d 1502, 1505 (9th Cir. 1995) (emphasis in original). There are no other waivers to section 9. *See also* 16 U.S.C. § 1538; HCP at 1-4. NWF-2

Non-Federal Non-Flow Activities

The BA and HCP must clarify the extent to which stocking of non-native sport fish is a covered activity. In BA Section 6.3, it is considered a cause of cumulative effect (and therefore, not covered). In Section 5.6, it is a covered activity (BA at 5-79 (impacts of stocking on razorback sucker); 5-78 (impacts on bonytail)). For example, Nevada stocks rainbow trout, but is not including the activity in the LCR MSCP (HCP 2-18). The EIS/EIR, however, states that Nevada DOW is seeking coverage for trout stocking (EIS/EIR at 1-15). Please clarify whether Nevada's stocking efforts are covered by the MSCP or elsewhere, and adjust your impacts analysis accordingly. NWF-3

No Determination of Adverse Impact

It appears that these documents do not adequately analyze the effects to designated critical habitat. NWF-4

Reclamation and Conservation Measures

The document should more clearly state that the past conservation measures are only counted for the past actions for which they were developed. NWF-5

Reclamation's Modeling Assumptions

A major flaw in the hydrological model is that it fails to account for the likelihood that climate change will affect the hydrology of, and demand within, the Colorado River basin states. Climate change impacts could reduce inflows by as much as 20 percent.[1] Such reductions in inflow would further exacerbate the trend toward system shortage, with resultant adverse impacts on NWF-6

[1] See L. Nash and P. Gleick, 1991, The sensitivity of streamflow in the Colorado basin to climatic changes, *Journal of Hydrology* 125: 221-241 and L. Nash and P. Gleick, 1993, The Colorado River Basin and Climatic Change: The Sensitivity of Streamflow and Water Supply to Variations in Temperature and Precipitation, Washington, DC: US EPA, EPA230-R-93-009, 121 pp.

habitat and listed species. Another flaw is that the model assumes operation of the Yuma Desalting Plant in 2023 (BA at 5-4). If Reclamation continues with the assumption of operating the Plant, this BA must also consider the effects of such an assumption on listed species and their habitats. Operation of the Plant will have significant environmental impacts on the Colorado River delta, particularly the Cienega de Santa Clara. NWF-6 con't

Take Mitigation

Bonytail and Razorback Sucker

The conservation measures for the bonytail and razorback sucker are insufficient to minimize and mitigate because the measures to stock razorback suckers and bonytails are not targets, but assumptions (HCP at 5-40, 5-45). As stated, the MSCP may cease stocking if there are factors in the reach that are not conducive to the survival of stocked fish. However, as long as the threats of non-natives and the loss of ecosystem function remain, survival is questionable. Should stocking cease, "other management, research, and monitoring needs that would minimize and mitigate incidental take" would be funded. What are these "other" actions, who and when determined, and how will we know they do indeed minimize and mitigate? Mitigation should compensate for lost habitat or individuals; research does not address the impacts (HCP Handbook at 3-23). NWF-7

Burrowing Owl

The LCR MSCP DEIS/DEIR fails to address the impacts to Burrowing Owls. NWF-8

A. The LCR MSCP fails to analyze and mitigate impacts to burrowing owls pursuant to CEQA.

The California Environmental Quality Act (CEQA) declares that it is the policy of the state to "[p]revent the elimination of fish or wildlife species due to man's activities, ensure that fish and wildlife populations do not drop below self-perpetuating levels, and preserve for future generations representations of all plant and animal communities" (California Public Resources Code, section 21101(c)). In addition, Section 15065 of the CEQA guidelines requires a finding of significant impact if a project has the potential to "reduce the number or restrict the range of a rare or endangered plant or animal."

While burrowing owls are not currently listed as threatened or endangered under the state or federal ESA, these owls are considered to be a state Species of Special Concern under CESA. In fact, California Department of Fish and Game (CDGF) has a Staff Report on Burrowing Owl Mitigation (1995). This report was developed to assist CDFG to analyze, under CEQA, impacts to burrowing owl and develop appropriate mitigation.

Burrowing owls occur in the areas impacted by the LCR MSCP. In fact, the draft version of the MSCP had estimated that up to 795 acres of burrowing owl habitat would be destroyed and 8,132 acres of foraging acres would be lost due to MSCP activities habitat (see Administrative Draft, LCR MSCP Biological Assessment dated September 26, 2003). Given the prevalence of burrowing owls in both canals and agricultural lands, it is likely that these activities will also result in the destruction of owl burrows, including immature owls.

In the most recent draft of the LCR MSCP, the discussion of impacts to burrowing owl is absent. There is no reference to the amount and type of habitat lost or impacted. Instead, there is only a brief discussion that burrowing owls will not be significantly impacted as the lands impacted are *only* agricultural lands (EIS/EIR at 3.4-32). NWF-8 con't

The deletion of the discussion of impacts violates CEQA's requirement that impacts are fully disclosed and discussed. Second, the loss of 795 acres of owl habitat and more than 8,000 acres of foraging habitat should be considered significant and should be mitigated. The state burrowing owl population is on the decline. The population in the lower Colorado River area is the last stronghold of owl populations in California. While CDFG declined to list the owl, in its status review, it did note the heavy reliance of owls on agricultural lands, particularly in the Palo Verde and Imperial Valleys. Thus, the LCR MSCP's dismissal of impacts due to the program's limitation to agricultural lands runs counter to what CDFG has stated are essential lands for the continued survival of the burrowing owl in California (CDFG Evaluation of Petition to List the Western Burrowing Owl, October 2003).

In order to satisfy the requirements of CEQA, the project proponents should reanalyze the impacts of this project on burrowing owls, and make a finding of a significant impact on the burrowing owl. Mitigation should be developed utilizing CDFG's Burrowing Owl Guidelines, including avoiding the destruction of occupied burrows.

B. The LCR MSCP fails to analyze and mitigate the impacts to burrowing owls pursuant to Fish and Game Code sections 3503 and 3503.5. NWF-9

As discussed above, the Administrative Draft of the LCR MSCP discussed impacts to burrowing owl. These impacts included the possible destruction of occupied burrows/nests if ground-disturbing activities occurred during nesting season (Administrative Draft, LCR MSCP Biological Assessment, p. 5-47). California Fish and Game Code prohibits the take, possession or destruction of the nest or egg of any bird of prey, including burrowing owls (Fish and Game Code Section 3503.5). If the LCR MSCP is permitting ground-disturbing activities during owl nesting season, this project's applicants will likely be liable for violating the Fish and Game Code. Therefore, the LCR MSCP must address these possible impacts to burrowing owl by constructing mitigation prohibiting the destruction of nests. These mitigation measures could include surveying prior to ground-disturbing activity.

The Limitrophe (Reach 7) NWF-10

The LCR MSCP is missing what may be the premier opportunity to conserve species on the Lower Colorado River. This area is the limitrophe reach of the river, known in MSCP terminology as reach 7. This reach of the Colorado contains stands of cottonwood-willow with a much higher density than that found elsewhere on the Lower Colorado, 18% of land cover in the first 10 kilometers below Morelos Dam as compared to 1-2% as a maximum land cover value along the Lower Colorado River between Lees Ferry and Morelos Dam, even in wildlife refuges (Hinojosa-Huerta et al., 2003. Rapid Ecological Assessment of the Limitrophe Zone of the Colorado River, prepared for Environmental Defense). Significantly, these cottonwood and willow trees have established due to recent overbank flooding since 1980, and have been maintained by relatively high groundwater levels. Surface water in reach 7 is a regular feature,

providing breeding sites for insects that are food for resident and migrating birds. These conditions have together allowed a healthy native ecosystem to flourish. However, the maintenance of these conditions is not guaranteed, as drought and local groundwater pumping are both likely to deplete the water available to the limitrophe. NWF-10 con't

The LCR MSCP has an opportunity in the limitrophe both to protect habitat whose future is uncertain, as well as to augment this habitat. While the HCP proposes creating cottonwood-willow sites by planting trees and irrigating them, the limitrophe is far better suited to conservation and restoration based on instream flows. Here, a modest baseflow in the river channel, plus occasional floods, would secure the future of this excellent habitat.

The LCR MSCP could contribute significantly to conserving habitat on the Lower Colorado River by adopting an ongoing focused effort by the Cocopah Indian Tribe, and supported by National Wildlife Federation, to create an international conservation area (see DEIS/DEIR at 4-24). This process has been underway for several years, and is paralleled by an effort in Mexico to protect the Colorado River riparian corridor from the northern extent of the boundary of the Biosphere Reserve of the Colorado River Delta and Upper Gulf of California.

We hope that the LCR MSCP can be amended to reflect this opportunity. In addition, we note that the LCR MSCP documents incorrectly characterize both the physical and biological qualities of the limitrophe, reach 7. NWF-11

1. Throughout the LCR MSCP documents, flows in reach 7, the limitrophe, are erroneously characterized. The text itself is contradictory at times, stating that it "has some flow from dam seepage, but the majority of the reach is generally dry" (DEIS/DEIR 3.0-2) and that "much of the flow in the river downstream of Morelos Dam is return flows from upstream irrigation districts" (DEIS/DEIR at 3.9-7). Neither of these statements accurately characterizes the source or quantity of flows in the limitrophe. In general, these flows can be understood to come from a variety of sources, including:
   a. Seepage from Morelos Dam.
   b. Flows that are released at Morelos Dam, including both flood flows (which occurred more than 25% of years 1980-2000) and other flows that Mexico chooses not to divert, such as occasional over-deliveries from the United States.
   c. Irrigation return flows from Mexico.
   d. Wasteways (at 11 miles and 21 miles) in the United States that release several thousand acre-feet annually in non-flood years (Ruth Thayer, Bureau of Reclamation, personal communication 8/6/04).
   e. Groundwater flows from both the United States and Mexico. The quantity of groundwater flow into the Colorado River channel in the limitrophe is unknown; however, a recent study demonstrates that depth to groundwater at the edge of the riparian corridor is no greater than 1-2 meters, and that groundwater levels exceed river elevation, suggesting that the direction of flow is into the river (Zamora-Arroyo, et al., 2001. Regeneration of Native Trees in Response to flood releases from the United States into the delta of the Colorado River, Mexico. J. Arid Environments 49:1).

While most of these inputs are not quantified, the average total flow in the limitrophe in non-flood years is 22,000 acre-feet, and in flood years is 2,120,000 acre-feet (Cohen and Henges-Jeck, 2001. Missing Water: The Uses and Flows of Water in the Colorado River Delta Region, Pacific Institute). NWF-11 con't

2. The importance of reach 7, the limitrophe, for several of the LCR MSCP covered species is neglected: NWF-12

a. The limitrophe is an important stopover site for migrating southwest willow flycatchers in their migration movements before they reach their breeding grounds (Garcia-Hernandez et al., 2001. Willow Flycatcher (*Empidonax traillii*) surveys in the Colorado River delta: implications for management. J. Arid Environments 49:1). It has been well documented, in general for landbirds, that the quality and availability of stopover sites during migration is one of the key factors determining survivorship rates for these species. The description of this bird in Appendix I, "Status of LCR MSCP Covered Species" fails to mention the importance of stopover sites to this migrant (Appendix I at I-7).

b. Other key species of conservation concern in the limitrophe are the Yellow-billed Cuckoo, Arizona Bell's Vireo, and Summer Tanager, all of which were found present in recent surveys of the limitrophe (Hinojosa-Huerta et al., 2003. Rapid Ecological Assessment of the Limitrophe Zone of the Colorado River, prepared for Environmental Defense). Descriptions of these birds in Appendix I, "Status of LCR MSCP Covered Species" fails to mention their presence in the limitrophe (Appendix I at I-49, I-61, and I-69). NWF-13

Conservation Areas and Tribes NWF-14

The National Wildlife Federation recommends that interested and willing tribes within the MSCP planning area be given priority for conservation area sites.

Implementing Agreement Must Be Issued for Comment Before Any Permit Is Issued NWF-15

As indicated by the MSCP documents, an Implementing Agreement "will be prepared" that "will describe assurances and other commitments," BA at 2-102, and "will specify the legal obligations, roles, and responsibilities of each signatory" (HCP at 7-9). The Implementing Agreement is in the title of the Federal Register notice, but not included in the HCP, BA, EIS or Appendices. It would be helpful to be able to review the implementing agreement along with all the draft documents available at this time for public comment.

Thank you for the opportunity to comment. Please do not hesitate to contact me if you have questions.

Sincerely,

Myra Wilensky

Myra Wilensky
Regional Representative

/MKW